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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON
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10 PAUL BOYCE,

11 Plaintiff,

12 v.

13 JO ANNE BARNHART, Commissioner)
14 of Social Security,

15 Defendant.
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) No. 03-6380-HU
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) **AMENDED**
) OPINION AND ORDER
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28 AMENDED OPINION AND ORDER - 1

1 HUBEL, Magistrate Judge:

2 Paul Boyce brought this action to obtain judicial review of a
3 final decision of the Commissioner of the Social Security
4 Administration (Commissioner) denying his applications for
5 disability insurance benefits and Supplemental Security Income
6 (SSI) disability benefits.

7 **Procedural Background**

8 Mr. Boyce filed for disability benefits on July 29, 2002, and
9 SSI disability benefits on **October 1, 2002**. He alleges disability
10 as of March 31, 2000. His applications were denied initially and on
11 reconsideration. A hearing was held on July 22, 2003, before
12 Administrative Law Judge (ALJ) William L. Stewart. In a decision
13 issued on August 28, 2003, the ALJ found Mr. Boyce not disabled.
14 The Appeals Council denied Mr. Boyce's request for review, making
15 the ALJ's decision the final agency decision.

16 The Commissioner now concedes that her decision was erroneous
17 and moves to remand the case to enable the ALJ to: 1) address and
18 explain the weight given to the lay opinion of the occupational
19 therapist and her physical capacity evaluation; 2) address the
20 opinion of the treating physician; 3) consult with a medical expert
21 to determine the severity of Mr. Boyce's impairments; 4) fully
22 address Mr. Boyce's testimony and reconsider his subjective
23 complaints; 5) re-evaluate Mr. Baker's ability to return to his
24 past relevant work; and 6) consult with a vocational expert to
25 clarify the effects of any assessed limitations on the occupational
26 base.

1 **Factual Background**

2 Mr. Boyce was 51 years old at the time of the hearing. He
3 attended college for two years. He received disability benefits from
4 May 1985 until September 2001. Between 1997 and 2000, he worked
5 part-time as a telemarketer.

6 **Medical Evidence**

7 In February 1979, while working as a boilermaker, Boyce fell
8 30 feet off a scaffold at a construction site and fractured his L-1
9 vertebra. Tr. 180, 221. A CT scan taken at the time of the injury
10 showed a bony fragment in the spinal canal. Tr. 180. The back healed
11 uneventfully, but Mr. Boyce continued to have intermittent tingling
12 and burning in the thighs, more on the right than the left, lasting
13 about five minutes at a time. Id.

14 _____He returned to work after approximately 10 months, but after
15 three years, stopped working at his previous occupation. Tr. 221.
16 He subsequently worked in plumbing construction, but began receiving
17 disability benefits in 1985. Id.

18 On April 27, 1982, Mr. Boyce saw Dr. McGroarty, a neurologist,
19 for numbness in the back of the right leg. Id. Upon examination, Dr.
20 McGroarty found mild decreased vibratory sense in both lower
21 extremities and decreased sensation to pin prick and touch in the
22 right posterior calf. Tr. 181. A myelogram and CAT scan showed the
23 old fracture at L-1 and slight narrowing of the spinal canal. Tr.
24 179.

25 In May 1987, Mr. Boyce reported problems with bowel
26 incontinence and urinary retention, as well as continued tingling
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1 in his legs. Tr. 174. A myelogram showed moderate wedge compression
2 of L-1 with mild posterior spurring at T12-L1 and L1-2 mildly
3 indenting the ventral margin of the caudal sac. Tr. 172. The
4 radiologist concluded that there was more posterior spurring than
5 in previous studies. Id.

6 On February 19, 1988, Dr. McGroarty wrote a letter stating that
7 Mr. Boyce had spinal cord trauma with sensory disorganization and
8 impairment of bowel and bladder control. Tr. 157. On December 16,
9 1988, Dr. McGroarty wrote another letter stating that she believed
10 Mr. Boyce was disabled because of back pain, leg spasms and
11 incontinence. Tr. 142. She added:

12 He needs ready access to a bathroom because of his
13 urinary frequency and urgency. His back pain limits his
14 ability to do the job he was trained for and the leg
15 spasms limit how long he can sit, as does the back pain.

16 Id. An MRI on October 13, 1989, showed an old compression fracture
17 at L1 with marked kyphotic angulation at the T12-L1 level and early
18 degenerative changes at the L5-S1 disc. Tr. 135.

19 On July 25, 1989, Mr. Boyce was seen by Dr. Ribovich, a
20 neurosurgeon. Tr. 112. Mr. Boyce reported continued sphinteric
21 dysfunction, with increasing frequency of urinary and fecal
22 incontinence over the last six months. Id.

23 Upon examination, Dr. Ribovich noted decreased pin sensation
24 along the plantar aspect of the left foot and decreased touch
25 sensation along the dorsal left foot. Tr. 112-13. He recommended a
26 repeat lumbar myelogram to investigate a possible compressive
27 lesion. Tr. 113. On September 29, 1989, Mr. Boyce was examined by
28 Dr. Johnson, another neurosurgeon. Tr. 110. His findings were

1 similar to those of Dr. Ribovich, and he agreed that there was "some
2 reason for concern because of persistent urinary and fecal
3 incontinence." Tr. 111. He also recommended either a repeat MRI or
4 myelogram and CT of the lumbar region. Id.

5 On January 14, 1999, Dr. McGroarty wrote a letter stating that
6 Mr. Boyce continued to have significant problems with back pain and
7 bladder and bowel incontinence. Tr. 121. She noted that his back
8 pain and incontinence were severely aggravated by certain physical
9 activities and sleeping on the wrong kind of mattress. Id. Dr.
10 McGroarty treated Mr. Boyce with injections from January 1999 to the
11 spring of 1999. Tr. 115-118, 119.

12 On January 31, 2002, Mr. Boyce was seen by Dr. Englander, a
13 neurologist. Tr. 221. Mr. Boyce reported that he had been on
14 disability since 1985. Id. Mr. Boyce told Dr. Englander that
15 although his back pain had been stable for quite a while, over the
16 past six months it had become more intense, with buttock pain and
17 dyesthesias. Id.

18 Mr. Boyce reported that he had stopped smoking in January 2000
19 after 34 years and that he previously been an alcoholic, but had
20 been sober for six years through AA. Tr. 222. Examination showed
21 normal sensation with the exception of over the buttock areas, where
22 he had significant hyperalgesia. Tr. 223. Dr. Englander thought Mr.
23 Boyce had probably sustained a burst fracture of L1 in 1979, with
24 neurologic residuals in the form of sensory disturbance. Id.

25 In a letter dated May 14, 2001, Dr. Englander said:

26 Mr. Paul Boyce is now under my care. He is seen
27 neurologically for residuals from a significant fall in

1 the mid-1980s which resulted in compression fracture,
2 cauda equina and lower spinal cord dysfunction which
3 gradually improved, but never completely recovered. this
4 has left him with a mild paraparesis and sensory loss in
his lower extremities which, I believe, makes him
disabled for any employment that he is qualified for by
virtue of age, education and experience.

5 Tr. 220. An x-ray taken January 31, 2002, showed a moderately severe
6 wedge compression fracture of the L1 vertebral body and disc
7 narrowing at L5-S1, consistent with mild to moderate degenerative
8 disc disease. Tr. 225.

9 On May 24, 2002, a two-hour Physical Capacity Evaluation was
10 done by Charlotte Maloney, OTR. Tr. 226-28. In her opinion, Mr.
11 Boyce could sit for three-quarters of an hour to an hour, stand for
12 half an hour to one hour, and walk for half an hour at a time; stand
13 and walk for two to three hours in an eight-hour day, and
14 occasionally carry up to five pounds. Tr. 226. She thought Mr. Boyce
15 was capable of performing "below sedentary" levels of work. Tr. 227.
16 In the narrative report attached to the form, Ms. Maloney noted that
17 Mr. Boyce gave sufficient effort to validate the evaluation, with
18 no inconsistencies in presentation or performance. Tr. 193.

19 On October 15, 2002, Dr. Englander completed a form stating
20 that Boyce could lift two pounds occasionally and one pound
21 frequently, walk or stand for two hours in an eight-hour day, and
22 sit four hours in an eight hour day. Tr. 217. Dr. Englander
23 concluded that Mr. Boyce was "not functionally normal and never will
24 be," and that he expected Mr. Boyce's restrictions to be permanent.
25 Id.

26 On April 2, 2003, Dr. Englander wrote that he thought it
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1 unlikely that Mr. Boyce could do a full-time sedentary job¹ due to
2 mild paraparesis and incontinence. Tr. 215. Dr. Englander thought
3 his condition had been unchanged since the 1985 injury to his spinal
4 cord. Id.

5 **Hearing Testimony**

6 Mr. Boyce testified at the hearing that he had urinary and
7 bowel incontinence and occasional uncontrollable shaking in his
8 legs. Tr. 237. He is unable to drive. Id. He is a recovering
9 alcoholic and, because of his "addictive personality," he takes only
10 ibuprofen for pain. Id. He is homeless. Id. Before he lost his
11 Social Security disability payments, he had an apartment. Tr. 238.

12 Mr. Boyce stated that he had been an alcoholic for the better
13 part of 16 years because "I was in a lot of pain and I justified my
14 drinking with ... you know, all this pain, nobody knows what I feel
15 like, wah, poor me, pour me another drink and-- but I'm not there
16 today, you know. I give that pain to God." Tr. 239. He has been
17 sober for six and a half years. Tr. 237, 240.

18 Mr. Boyce testified that he is sometimes unaware of needing to
19 have a bowel movement because of a loss of sensation. Tr. 244. This
20 causes fecal impaction. Id. He loses control of his bowels
21 approximately three times a week. Tr. 245-46. The bowel incontinence
22 is exacerbated by vibration and jarring, such as engine vibration
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24 ¹ Dr. Englander was asked to assume that sedentary work
25 involved lifting no more than 10 pounds at a time and occasional
26 walking and standing as well as sitting. He was also asked to
27 assume an eight hour day, five days a week, with 10-15 minute
breaks in the morning and afternoon and a lunch break of half an
hour to one hour.

1 on a bus. Tr. 263, 268. Mr. Boyce testified that in order to sit
2 through the Social Security hearing, he had not had dinner the
3 previous night or breakfast the day of the hearing. Tr. 246. Mr.
4 Boyce said he was able to do the telemarketer job because he could
5 get up and go to the bathroom whenever he needed to, which was
6 approximately every hour and a half to two hours. Tr. 250-51.

7 Mr. Boyce testified that his urinary incontinence is less
8 severe, but he probably has an accident two or three times a week.
9 Tr. 254. He said it "doesn't take much to throw my back out," and
10 then he will have to lie down for a day. Tr. 256. He has numbness
11 in his legs, particularly the right, and in his right foot. Id. He
12 characterized his back pain as "sometimes ... overwhelming," tr.
13 258, and said he has "a couple" of episodes a day that last about
14 ten minutes. Tr. 259.

15 The ALJ called a vocational expert (VE), Vernon Arne. The ALJ
16 asked the VE to consider an individual 51 years old with two years
17 of college able to carry up to 10 pounds frequently with an
18 occasional 20-pound maximum, precluded from prolonged sitting,
19 standing or walking without an opportunity to change position. The
20 individual is able to sit three-quarters of an hour at a time and
21 four to six hours a day, stand for half an hour to an hour, two to
22 three hours a day, and walk half an hour at a time, two to three
23 hours a day. Further, the individual would need ready access to
24 bathroom facilities with a few minutes' notice and avoid long
25 vehicle rides. The VE opined that such a person could work as a
26 telemarketer. Tr. 277.

1 The VE testified that it would be considered an employer
2 accommodation if the individual needed to take an additional 20
3 minutes outside allotted break times to attend to needs related to
4 bladder or bowel accidents, or to go to the bathroom on a moment's
5 notice. Tr. 280-81. The VE testified that an employer would not
6 typically permit an employee to lie down periodically. Tr. 281.

7 The VE testified that the limitations identified by Dr.
8 Englander, tr. 217, would not allow full-time work in a sedentary
9 job. Tr. 282-83.

10 Discussion

11 The Commissioner moves for a remand for further proceedings,
12 requesting that the ALJ essentially be given an opportunity to
13 reconsider every issue in the case, including uncontradicted medical
14 evidence from a treating physician, vocational evidence, the
15 claimant's testimony, and the VE's testimony. The Commissioner
16 concedes that the ALJ failed to provide sufficient grounds for
17 rejecting the evidence from Dr. Englander and Ms. Maloney. The
18 Commissioner concedes that the ALJ made errors in evaluating the
19 testimony of Mr. Boyce. The Commissioner concedes that the ALJ needs
20 to "clarify" the questions asked the VE and reevaluate Mr. Boyce's
21 ability to return to his past work as a telemarketer. Nevertheless,
22 the Commissioner asserts that there are "unresolved issues" and the
23 record "does not require a finding of disability."

24 Remand for further administrative proceedings is appropriate
25 if enhancement of the record would be useful. Benecke v. Barnhart,
26 379 F.3d 587, 593 (9th Cir. 2004); Harman v. Apfel, 211 F.3d 1172,

1 1178 (9th Cir. 2000). Conversely, where the record has been
2 developed fully and further administrative proceedings would serve
3 no useful purpose, the district court should remand for an immediate
4 award of benefits. Benecke, 379 F.3d at 593; Smolen v. Chater, 80
5 F.3d 1273, 1292 (9th Cir. 1996). The district court should credit
6 evidence that was rejected during the administrative process and
7 remand for an immediate award of benefits if 1) the ALJ failed to
8 provide legally sufficient reasons for rejecting the evidence; 2)
9 there are no outstanding issues that must be resolved before a
10 determination of disability can be made; and 3) it is clear from the
11 record that the ALJ would be required to find the claimant disabled
12 were such evidence credited. Benecke, 379 F.3d at 293; Harman, 211
13 F.3d at 1178.

14 Where this three-part test is satisfied, the court takes the
15 claimant's testimony to be established as true and remands for an
16 award of benefits. Benecke, 379 F.3d at 593. The current case
17 satisfies the criteria for a remand for immediate payment of
18 benefits. The Commissioner admits that the ALJ failed to provide
19 legally sufficient grounds for rejecting uncontradicted medical and
20 vocational evidence and subjective testimony from Mr. Boyce. There
21 are no disputed factual issues or ambiguities in the record which
22 preclude a determination of disability. And it is clear from the
23 record that the ALJ would be required to find Mr. Boyce disabled
24 were the evidence from Dr. Englander, Ms. Maloney and Mr. Boyce
25 credited.

26 In Benecke, the court made clear its disapproval of remands for
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1 further proceedings to address improperly discredited evidence and
2 testimony, because such remands contribute to waste and delay and
3 provide "no incentive to the ALJ to fulfill [his] obligation to
4 develop the record." 379 F.3d at 595. The Benecke court
5 characterized such remands as an "unfair 'heads we win; tails let's
6 play again' system of disability benefits adjudication." Id.

7 I conclude that it is unnecessary and inappropriate to further
8 delay much-needed income to a claimant who is unable to work,
9 entitled to benefits, and currently homeless.

10 The Commissioner's motion for remand for further proceedings
11 (doc. # 16) is DENIED. This case is reversed and remanded for the
12 immediate payment of benefits **for the period covered by plaintiff's**
13 **applications for disability insurance benefits filed on July 29,**
14 **2002 and SSI disability benefits filed on October 1, 2002.**

15 IT IS SO ORDERED.

16 Dated this 19th day of April, 2005.

17 /s/ Dennis J. Hubel

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19 Dennis James Hubel
20 United States Magistrate Judge
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